Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1979

No. 79-1192

FOREST E. OLSON, INC. AND COLDWELL, BANKER AND CO.,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE (CALIFORNIA REAL PARTY IN INTEREST).

Respondent.

TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, 4th APPELLATE DISTRICT, DIVISION 2

PETITION FOR A WRIT OF CERTIORARI

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FOREST E. OLSON, INC. AND COLDWELL, BANKER AND CO.,

Petitioners,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

The petitioners Forest E. Olson, Inc., and Coldwell, Banker and Company respectfully pray that a Writ of Certiorari issue to review a peremptory writ of mandate issued by the California Court of Appeals, which commanded the trial court to vacate its order granting petitioners motion for summary judgment, the opinion entered August 21, 1979 and the writ issued December 18, 1979. A timely petition for hearing to the California Supreme Court was denied on November 18, 1979.

OPINION BELOW

The opinion of the Court of Appeals is reported at 96 Cal. App.3d 181 and appears in the appendix hereto. No opinion was rendered by the Supreme Court of the State of California in denying the petition for hearing filed by petitioners. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §§ 1254 (1), 1257 (2) and (3), and 2103.

QUESTION PRESENTED

Does the protection afforded commercial speech by the First and Fourteenth Amendments of the United States Constitution prohibit the State of California from *punishing* false or misleading advertising by civil monetary penalty and/or criminal fine and/or imprisonment on a showing of negligence, or do these constitutional protections require the state to prove legal malice: that the advertisement was published with the knowledge by the advertiser that the advertisement was false or misleading or that the advertiser published the ad with reckless disregard for whether the advertisement was false or misleading? If the *New York Times v. Sullivan* malice standard is a constitutional minimum for imposition of such penalties, then the California Court of Appeals was in error in upholding the statutes under attack and the California Supreme Court was in error in denying a petition for hearing.

JURISDICTION AND THE FINALITY OF JUDGMENT RULE

1. Procedural Posture of the Case

The trial court in the case at bar declared *California Business and Professions Code* § 17500 *et seq.* unconsti-

tutional on its face because it punished the negligent publication of false or misleading advertising by monetary fine. In granting summary judgment, it dismissed the complaint filed on behalf of the People of the State of California by the District Attorney of Orange County.

Because the summary judgment did not dismiss the cross-complaint filed by petitioner on an unrelated search and seizure-Fourth Amendment issue, the People sought reversal of the entry of summary judgment by means of a writ of mandate ordering the trial court to reverse the order entered granting summary judgment. The Court of Appeal issued the writ, and thus upheld the constitutionality of the California statute. This opinion was filed on August 21, 1979.

A timely petition for hearing to the California Supreme Court was denied on November 18, 1979.

2. The Case for Jurisdiction

This court's jurisdiction is invoked under 28 U.S.C. § 1254(1); 1257(2)(3), and if these jurisdictional bases are found to be absent, through a petition for certiorari under 28 U.S.C. § 2103.

The case of *Cox Broadcasting v. Cohn,* 420 U.S. 469 (1975) is controlling as to the jurisdiction of the United States Supreme Court to issue the writ of certiorari or grant the appeal, as the case may be.

In *Cox,* the plaintiff-appellee father of a deceased rape victim sued the defendant, defendant's reporter and broadcaster for civil damages under a Georgia statute and under a tort theory of common law invasion of privacy. The trial court granted the father's motion for summary judgment as to liability, rejecting the First and Fourteenth Amendment challenges to the constitutionality of the Georgia statute. The determination of damages was to await trial.

On appeal, the Georgia Supreme Court held that the trial court erred in construing the Georgia statute to allow a civil cause of action for invasion of privacy and thus found it unnecessary to consider the constitutionality of the statute. The Georgia Supreme Court held that a common law tort cause of action for invasion of privacy did exist, but summary judgment was improper because there were still factual questions on the issue of liability, and the case was remanded to trial.

On rehearing, the Georgia high court agreed that the First and Fourteenth Amendments, as a matter of law, did not require judgment for appellant on the common law tort theory, but it skirted the issue of whether the statute was constitutional. On rehearing, the court upheld the pertinent Georgia statute as constitutional. *Id* at 474-475.

Despite the remand for trial as to both liability and damages, the United States Supreme Court upheld jurisdiction. In so doing, the opinion sets forth several categories of cases in which jurisdiction is appropriate even though there are still proceedings remaining in the lower courts. The case at bench fits several of those categories.

> "In the first category are those cases in which there are further proceedings — even entire trials — yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings ordained . . . the judgment of the state court on the federal issue is deemed final." *Id* at 479. *Accord, Mills v. Alabama,* 384 U.S. 214 (1966).

In the case at bench, the First Amendment issue is preordained for the purposes of trial and further appeal by the doctrines of law of the case and/or res judicata.

A second category discussed in *Cox* is also satisfied by the case at bench. The *Cox* opinion states that the high court has jurisdiction:

> "Where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. Thus, in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review. The court has taken jurisdiction in these circumstances prior to completion of the case in the state courts." *Cox, supra* at 481. *Accord, California v. Steward,* 384 U.S. 436 (1966) (decided with *Miranda v. Arizona*); *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.,* 414 U.S. 156 (1973).

A third category of cases in which jurisdiction has been upheld is also satisfied by the case at bench. The *Cox* opinion reads as follows:

> "Lastly, there are those situations where the federal issue has been finally decided in state courts with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary reveiw of the federal issue by this court, and where reversal of the state court on the federal issue would be preclusive of any further litigation *on the relevant cause of action* rather than merely controlling the nature and

character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the court has entertained and decided the federal issue, which itself has been finally determined by the state courts for the purposes of the state litigation." *Id* at 482-482. (Emphasis added.) *Accord Construction Laborers v. Curry,* 371 U.S. 542 (1963); *Mercantile National Bank v. Langdeau,* 371 U.S. 555 (1963); *Miami Herald Publishing Company v. Tornillo,* 418 U.S. 241 (1974).[1]

The *Cox* court thus concluded that the Georgia Supreme Court's judgment was final on the federal issue, that the proof of the elements of the state cause of action would induce liability for damages on the constitutionally protected speaker, and that even though the defendants could prevail at trial on non-federal grounds, the defendants would be forced to go through a trial which should not occur if the statute was erroneously upheld. Additionally, the fact that there would remain in effect an unreviewed decision controlling state law on an important First Amendment issue would "leave unanswered . . .an important question of freedom . . . under the First Amendment." *Citing Tornillo, supra* at 247 n.6.

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[1] Of particular relevance to the case at bench is the *Cox* discussion of Tornillo, *supra* at 484. The quoted portion of Tornillo concludes that it is intolerable to leave unanswered an important question of the freedom of the press under the First Amendment where to leave the question unanswered would only further harm the operation of a free press.

To leave the question in this petition unanswered is to leave every commercial speaker open to suit for monetary or criminal penalty for the negligent exercise of a constitutionally protected First Amendment right if the advertising statutes so provide.

The court concluded that it should not leave the press in Georgia operating under the shadow of civil and criminal sanctions embodied in a statute the constitutionality of which was in serious doubt, and it decided to reach the merits of the case. *Cox, supra* at 486.

Petitioner asks that the same opportunity for a hearing on this important issue be granted to the commercial speaker and that an important balancing of the First Amendment and consumer protection occur so as to clarify the right of commercial speakers under various false and misleading advertising statutes throughout this nation.

THE STATUTES

The following statutes codified in the *California Business and Professions Code* are collectively referred to as the "Statutes":

Business and Professions §17200 (formerly at *Civ. Code* § 3309 *et seq.*):

"As used in this chapter, unfair competition shall mean and include unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code."

Business and Professions Code § 17206:

"Any person who violates any provision of this chapter shall be liable for *a civil penalty not to exceed Two Thousand Five Hundred Dollars ($2,500) for each violation* . . ."

Business and Professions Code § 17500:

"It is unlawful for any person, firm, corpora-

tion or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation or in any other manner or means whatever, any statement, professional or otherwise, concerning such real property or services or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue *or* misleading, or *which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading,* or for any such person, firm or corporation to so make or disseminate or cause to be so made or disseminate any such statement as part of a plan or scheme with the intent not to sell such personal property or services, professional or otherwise, so advertised at the price stated therein, or as so advertised. *Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding Two Thousand Five Hundred Dollars ($2,500), or by both.*" (Emphasis added.)

Additionally, Section 17536 of the Business and Professions Code provides for a maximum civil penalty of $2,500 for each violation. Suit may be brought by the California Attorney General, or any district attorney, county counsel or city attorney.

STATEMENT OF THE CASE

On eight occasions during 1974 and 1975, defendant Forest E. Olson, Inc. (hereinafater FEO) published an advertisement in Southern California newspapers which listed 406 street addresses surrounding a box which stated the following:

> "SOLD IN 8 DAYS OR LESS in Orange and Riverside Counties! When You List Your Home With FOREST E. OLSON BE PREPARED TO MOVE FAST! Information from Forest E. Olson's Computer Center, 1/1/74 - 3/31/75."

The advertisement identified 406 properties as "sold in eight days or less", or "sold in four days or less", and it is on these sales that respondent bases its misleading advertising allegation. Approximately 173 of the properties were tract sales of either townhouses or multilevel condominiums. Approximately 10 residences were located outside of Orange and Riverside Counties, and 51 of the residences were not sold within eight days or less, but were sold within 20 days, and in most instances within 10 days.

There was no showing of actual reliance on the ad by any prospective purchaser, no showing of unjust enrichment by petitioners, and no showing of actual injury to any reader of the ad.

The tract sales that appeared in the advertisement as sold within 4 or 8 days comprised the heart of respondent's case. These homes were subject to "master-sales contracts" with builder-developers. When an individual unit was sold, a listing agreement and deposit receipt on the unit were prepared by the tract sales person and submitted to the FEO computer prior to the advertisement ever being conceived and data requested from the FEO computer. When data for the ad was requested, the computer

returned the tract sales in its report of homes sold within four or eight days, and these sales then became a part of the ad, even though FEO's authority to sell the entire tract pursuant to the master contract may have existed for months.

In summary, the evidence before the Court showed inadvertent oversight by different people who had separate business functions and who worked in different departments in a corporate organization. There was no evidence of intentional publication of misleading advertising or of reckless disregard for whether or not the advertising was misleading. At most, there was a factual issue as to whether there was a negligent publication of misleading advertising.

THE CONSTITUTIONAL BALANCING

1. Petitioner's Position

Petitioner's position is straight forward. It involves recognition of two rules of law and agreement with two judgmental conclusions.

(i) A Balancing test must be applied to determine the correct constitutional minimum;

(ii) Laws regulating a consitutionally protected First Amendment right must be narrowly drawn;

(iii) A balancing of the additional protection of the public afforded by allowing civil monetary penalties for the negligent publication of deceptive advertising as compared to a requirement that civil monetary penalties and criminal penalties could only be imposed upon proof of malice leads to a conclusion that the additional protection is minimal or nonexistent;

(iv) The burden imposed on commercial speech by the punishment of the negligent exercise of the right of commerical speech is substantial;

therefore, the appropriate conclusion is as follows:

An application of the balancing test requires that the proof of actual malice as defined in *New York Times v. Sullivan,* 376 U.S. 254 (1963) and its progeny be required as a constitutional minimum for *punishing* commercial speech with monetary and/or criminal penalties.

2. Petitioner's Concessions

Petitioners concede that the state has the right to regulate false or misleading advertising, and that the state interest in protecting the public from false and misleading advertising is a substantial state interest.

Petitioners also concede that injunctive relief, both temporary and permanent, are available on a showing of negligent publication of a false or misleading advertisement.

Petitioners additionally concede that restitutionary recovery, securing from the false or misleading advertiser any profits or other tangible gains derived from false or misleading advertising, can be recovered by the state or private individuals, by statute or by common law remedies, on a showing of negligence. Restitutionary recovery was *not* before the court in this case.

It is further conceded that recovery by the state and/or members of the public of actual damages incurred by the public or the state as a result of a misleading advertisement is recoverable without proof of malice.

Petitioners' position is that only the imposition of *penalties, not* redressing actual injury or return of unjust enrichment, requires proof of malice as a condition precedent to the state penalizing the constitutionally protected speaker.

REASONS FOR GRANTING A HEARING TO PETITIONER

There are five reasons for granting a hearing in this case. They are as follows:

1. The importance and novelty of the issue;

2. The great impact of the misleading advertising statutes across the nation;

3. The impact of this case;

4. The inability of the petitioners to raise the constitutional issue if the petition is denied;

5. It is unlikely that any constitutionally protected speaker will bring this issue to the United States Supreme Court.

1. The Importance and Novelty of the Issue

The importance of the First Amendment as one of our most cherished freedoms is without question. *New York Times v. Sullivan,* 376 U.S. at 270, *Herbert v. Lando,* ____U.S.____ 60 L.Ed.2d 115, 141, 99 S.Ct. ____(1979).

In this decade, this Court has carved out a protected sphere for commercial speech which protects the right of the speaker, yet recognizes the common sense conclusion that commercial speech is afforded "a limited measure of protection, commensurate with its subordinate position in the scale of the First Amendment values . . ." *Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 456 (1978).

The High Court has evolved this protection to strike down statutes which, in effect, prohibit a speaker to advertise a certain type of information on the grounds that both the speaker and listener have a protected right which is not outweighed by the state's regulatory interest. *Bigelow v. Virginia,* 421 U.S. 809 (1975) (criminal punishment for publishing an advertisement encouraging abortion). *Virginia Citizen's Consumer Council, Inc.,* 425 U.S. 748 (1976) (statute prohibits advertisement of prices for prescription drugs); *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977) (prohibition of advertising by attorneys).

In all of these cases, the content of the advertisement was of significant interest to the listener.

In the case of an ordinance which prohibited "for sale" signs on resale of residential homes, but did not prohibit such signs on other types of property, on model homes, or in newspapers, this Court was *not* faced with a blanket prohibition, but was presented with a limitation on the time, place and manner of speech. *Linnmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 93 (1977). Though this limited restraint on speech is of constitutional significance, *Cf. eg. Kovacs v. Cooper,* 336 U.S. 77 (1949), *Adderly v. Florida,* 385 U.S. 39 (1966); *Grayned v. City of Rockford,* 408 U.S. 104 (1972), the *dual* interest of the advertiser and the "reader" of the commercial speech dealing with one defined subject matter (resale of homes) was, on application of a balancing test, of greater constitutional weight than the compelling state interest to be served by the ordinance.

In another circumstance of a time, place, and manner *restriction,* the prohibition of practicing optometry under a trade name was upheld based on a *minimal effect on the defined content* akin to an injunction. *Friedman v. Rogers,* 99 S.Ct. 887, 897, 47 U.S.L.W. 4151 (1979).

The case at bench presents a further step in this First Amendment path. The statute challenged *punishes unlimited and undefined* subject matter by *content* if the advertisment is found to be false or misleading. It functions as far more than a prohibition of defined conduct; it operates to deter misleading advertising and to *raise revenue* for the state by *punishing* speech in which there is assumed to be no value to misleading advertising. Revenue raising and protection of the public are squarely balanced against *punishment* of the exercise of a protected First Amendment right to which the "listener" loses little by denial of access to the prohibited content, yet the definition of the prohibited content itself is so unclear that the boundry line between punishable and permissive advertising is impossible to predict.

As such, the issue is both important and unique to this Court.[2]

2. The Impact of Misleading Advertising Statutes

The rising tide of consumer protectionist legislation in the 1960's and early 1970's has resulted in passage of many state statutes designed to prohibit and/or punish false and/or misleading advertising.[3] Millions of citizens

[2] *National Commission on Egg Nutrition v. FTC,* 570 F.2d 157, 161-163 (7th Cir. 1977) *cert. denied* 439 U.S. 821 (1978) presented the issue of whether the malice standard was required as a condition precedent to the issuance of a cease and desist order. This is akin to the application of the malice standard to injunctive relief ordered after an administrative trial. Petitioners conceded that injunctive relief does not require malice.

[3] *See e.g. California Business Profession Code* § 17500 *et seq.; Virginia Code Ann.* § 18.2-11(a), 128.2-216, 59 1-68.2-5, *Idaho Code* § 48-601 to 619; *ORS* 646.605-665 (Oregon). According to one commentator, forty-eight states, Puerto Rico, and Guam have enacted consumer protection acts. Uranga, "Idaho and Oregon Consumer Protection Acts: Administrative Powers of the Attorneys General"., 13 *Willamette L.J.,* 455 (1977).

are thus susceptible to punishment by fine and/or imprisonment under a variety of legal standards in the exercise of First Amendment rights.

3. The Impact of This Case

By its denial of the petition for hearing in this case, the decision of the California Court of Appeals is the law of California. Twenty million Americans have the First Amendment right of commercial speech limited by threat of punishment by monetary and/or criminal penalty under a statute which is constitutionally suspect.

Additionally, this case stands as precedent to presuade other courts and legislatures to allow imposition of civil *or* criminal penalties for the negligent publication of false or misleading advertising. It stands as the view of the prestigious California courts, and the conclusion reached is of some persuasive weight.

4. Inability of The Petitioner to Raise The Constitutional Issue and The Resulting Prejudice

If this petition for hearing is denied, petitioners will be returned to the lower court for trial. The appellate opinion will be binding as the law of the case.

Petitioner will then be faced with a choice of settling the case and buying peace or incurring the expense of trial plus the following procedures: (1) a hearing on findings of fact and conclusions of law, (2) the possible requirement of posting a bond on appeal, (3) a fruitless appeal to the court of appeals, (4) a fruitless petition for rehearing to the court of appeals, (5) a fruitless petition for hearing to the California Supreme Court, and (6) a petition for a writ of certiorari to this Court on the same First Amendment issue presented here.

If petitioners settle and buy peace, this Court is denied review of the issue.

If petitioners win at trial, this Court is denied review of the issue.

If petitioners lose at trial but judgment is rendered in a nominal sum, petitioners may find that the duty to their stockholders compels giving up the expenditure of further corporate resources to litigate the First Amendment issue. This Court is thus denied review of the issue.

5. It Is Unlikely That This First Amendment Issue Will Reappear For Supreme Court Review

In cases involving regulation of business, a trade or labor association of the industry regulated, or a large corporate or union entity representing the industry, usually challenges the regulation. It does so because the regulation affects its business. There is thus economic incentive and a "business need" to absorb the substantial cost associated with an appeal up several levels of courts to this Court.

In misleading advertising statutes such as are at issue here, the activity punished is advertising, but the media or advertising agency involved is not the defendant in such suits. The advertiser is the victim. Though it is conceivable that an advertising agency or publisher could be brought into the suit by a cross-complaint for indemnity, this procedure is untested in a quasi-criminal statute such as is at issue in the case at bench, and these cross-defendants would face a serious problem of standing to raise the First Amendment right of the advertiser-defendant on appeal.

Secondly, most defendants in misleading advertising cases are not large corporate defendants whose advertising is the product of an advertising agency. The defendants are small businessmen who cannot afford to absorb the adverse publicity and the economic burdens of litigation against the resources of the state through trial, one or two appellate levels of review, and then to this Court. The course of business prudence is plain: settle on whatever terms are insisted on by the state after some discovery and negotiation. The First Amendment rights are lost in the small businessman's attempt to avoid great cost and the time away from his business associated with resisting the litigation efforts of the state.

CONCLUSION

It is submitted that the best vehicle to protect the constitutionally protected right of commercial speech in the context of misleading advertising statutes is the malice standard: a threshold standard which discourages the state from filing suits which involve inadvertent errors, advertising exaggeration and puffing, yet allows the state to redress actual injury and secure restitution on a showing of negligence.

It is further submitted that this case may be the only case to come to the High Court to establish the appropriate balance in the protection of the public from advertising deception and the protection of the First Amendment.

Sixteen years ago this Court balanced the state's right to provide a remedy for libel and the individual's right to seek remedial relief for libel as against the competing interest of the First Amendment. This Court stated:

> "Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can

> claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." *New York Times v. Sullivan*, 376 U.S. at 269.

It is submitted that statutes punishing false and misleading advertising now join this list.

It is respectfully petitioned that this Court set this case for hearing and issue a writ of certiorari to the Court of Appeal of the State of California, 4th Appellate District, Division 2, and that this Court order a withdrawal of the peremptory writ of mandate issued by said court commanding the trial court to vacate its order granting Petitioners' motion for summary judgment.

Respectfully Submitted,

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APPENDIX

APPENDIX

The PEOPLE of the State of California,

Petitioner,

v.

SUPERIOR COURT, ORANGE COUNTY,

Respondent.

FOREST E. OLSON, INC., etc., *et al.*,

Real Parties in Interest.

FOURTH DISTRICT
DIVISION 2
No. Civ. 21098

Aug. 21, 1979

Cecil Hicks, Dist. Atty., Michael R. Capizzi, Asst. Dist. Atty., John D. Conley and Charles D. McFarland, Deputy Dist. Attys., for petitioner.

George Deukmejian, Att. Gen., Herschel T. Elkins, Asst. Atty. Gen., Ronald A. Reiter and Michael R. Botwin, Deputy Attys. Gen., for amicus curiae State of California.

No appearance for respondent.

Shelly Jay Shafron, Los Angeles, for real parties in interest.

OPINION

TAMURA, Associate Justice.

The central issue in this original proceeding is whether the California statutes dealing with false and misleading advertising (Bus. & Prof. Code, § 17500 et seq.) and unfair competition (Bus. & Prof. code, § 17200 et seq.) are violative of the First Amendment protection accorded to commercial speech.[1]

[1]Unless otherwise indicated all section references in this opinion are to the Business and Professions Code.

Section 17500 provides:

"It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, any statement, concerning such real or personal property or services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any such person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell such personal property or services, professional or otherwise, so advertised at the price stated therein, or as so advertised. Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both."

Section 17200 provides:

"As used in this chapter, unfair competition shall mean and include unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code."

The District attorney brought an action in the name of the People against Forest E. Olson, Inc., and Coldwell, Banker & Company (defendants) to enjoin and recover civil penalties for the alleged dissemination of false and deceptive newspaper advertisements in violation of the two statutes. To the extent the complaint sought recovery of the statutory civil penalties, the trial court granted defendants' motion for summary judgment on the ground that imposition of penalties for negligent dissemination of false or misleading advertising violates the First and Fourteenth Amendments to the United States Constitution and article 1, section 2 of the California Constitution and further that the provision authorizing imposition of a civil penalty not to exceed $2,500 for each violation is unconstitutional because it permits imposition of excessive fines. The District Attorney filed a petition for a writ of mandate to have this court review and set aside the order granting the summary judgment. We issued an alternative writ and order to show cause.

The pertinent facts on which the motion for summary judgment was based may be summarized as follows:

In July 1974, defendant Forest E. Olson, Inc. began running a full page advertisement in several Southern California newspapers. The advertisement consisted of a list of 406 street addresses surrounding a box containing the following message: "SOLD IN 8 DAYS OR LESS in Orange and Riverside Counties! When you list your home with FOREST E. OLSON BE PREPARED TO MOVE FAST! Information from Forest E. Olson's Computer Center, 1/1/74-3/31/75" The same advertisement with the same message modified to say "IN 4 DAYS OR LESS" instead of "8 DAYS OR LESS" was run on at least four occasions during 1975.[2]

[2]The advertisements appeared in the Los Angeles Times, the Orange County Register, the Anaheim Bulletin, and the Ventura Star Free Press.

Also during 1975, Forest E. Olson aired a radio advertisement over 11 stations consisting of the following message played against a background of a male monotone voice reading a list of addresses from a computer readout so rapidly that the addresses could only be identified as property locations: "You are listening to the computer readout of homes sold by Forest E. Olson Realtors in no more than eight days . . . . However, some people are skeptical so realizing this, Forest E. Olson, a Coldwell Banker Company, was reluctant to release this following computer readout . . . Each of these homes was sold by Forest E. Olson Realtors in no more than four days . . . Startling information? Yes. If you doubt the authenticity of this computer readout, consider this; if it weren't true, we couldn't say it. That's why we insist when you list your house for sale with Forest E. Olson, you'd better be prepared to move . . . fast."

Approximately 176 of the street addresses shown in the newspaper advertisements were of new tract houses, condominiums, and town houses for which Forest E. Olson, Inc. had exclusive sales contracts with builder developers. Although the sales contracts were executed long before the sales, a listing agreement bearing the date of sale was made out for each sale. The properties thus appeared to have been sold on the day they were listed. Additionally, approximately 10 of the addresses in the advertisement were outside of Orange and Riverside Counties and 51 houses on the list were not sold in either four or eight days.

Forest E. Olson, Inc. explained that the appearance of the new tract sales in the advertisement was the result of inadvertence; that the advertising department had requested the data processing department for a list of all property sold in four days or less and had relied upon a

computer readout list furnished by data processing; that there had been no "formal vice presidential approval" or review of the advertisement by the company's legal department. In short, defendants maintained that the evidence showed at most an inadvertent oversight by different people in the organization with separate business functions and not an intentional misstatement or reckless disregard of the truth. Defendants conceded, however, that the evidence presented a factual issue as to whether there was negligent dissemination of false or misleading advertising.

Defendants filed a motion for summary judgment and for an order determining certain issues to be without substantial controversy. The thrust of the motion was that imposition of civil penalties for negligently disseminating false or misleading information in defendants' commercial advertisements would violate defendants' free speech rights guaranteed by the federal and state Constitutions; that civil penalties may be imposed only upon proof that the misstatements were made with knowledge of their falsity or in reckless disregard of the truth. Defendants also contended that under sections 17536[3] and 17206[4]

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[3]Section 17536 provides:

"(a) Any person who violates any provision of this chapter shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney, county counsel, or city attorney in any court of competent jurisdiction.

"(b) If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State Treasurer. If brought by district attorney or county counsel, the entire amount of penalty collected shall be paid to the treasurer of the county in which the judgment was entered. If brought by a city attorney or city

only one violation of section 17500 and of section 17200 can occur for running a false or misleading advertisement in a single edition of a newspaper and that since publication occurred only on eight occasions, the maximum liability for civil penalties would be $40,000.

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prosecutor, one-half of the penalty shall be paid to the treasurer of the county and one-half to the city.

"(c) If the action is brought at the request of a board within the Department of Consumer Affairs, the court shall determine the reasonable expenses incurred by the board in the investigation and prosecution of the action.

"Before any penalty collected is paid out pursuant to subdivision (b), the amount of such reasonable expenses incurred by the board shall be paid to the State Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund the moneys shall be paid to the State Treasurer.

"As used in this subdivision, 'board' includes commission, bureau, division, and other similarly constituted agency.

"(d) As applied to the penalties for acts in violation of Section 17530, the remedies provided by this section and Section 17534 are mutually exclusive."

[4]Section 17206 provides:

"Any person who violates any provision of this chapter shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney or any city attorney of a city having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city or city and county having a full-time city prosecutor in any court of competent jurisdiction. If brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half of the State General fund. If brought by a district attorney, the penalty collected shall be paid to the treasurer of the county in which the judgment was entered. If brought by a city attorney or city prosecutor, one-half of the penalty collected shall be paid to the treasurer of the city in which the judgment was entered, and one-half to the treasurer of the county in which the judgment was entered."

The court granted defendants' motion, holding that section 17500 of the false advertising statute is facially unconstitutional because it permits recovery of civil penalties for negligently making false or misleading statements in an advertisement, that section 17200 of the unfair competition statute is unconstitutional as applied because it defines unlawful and unfair business practices to include a violation of section 17500 thereby permitting recovery of civil penalties under section 17206 for the negligent dissemination of false advertising, and that section 17536 is unconstitutional because it imposes excessive fines in violation of the First, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2 and 17 of the California Constitution.

The court further ordered that should an appellate court hold section 17500 et seq. and section 17200 et seq. to be constitutional, civil penalties would be recoverable only on proof that defendants disseminated the advertisements with knowledge they were false or misleading or with reckless disregard for whether they were false or misleading. The court further ordered that there can be but one violation of section 17500 and section 17200 for each day the advertisement appeared in a single edition of a newspaper so that the maximum civil penalties recoverable by the People would be $40,000.[5]

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[5]The following is the text of the order granting the motion for summary judgment:

"IT IS ORDERED that Defendant's Motion for Summary Judgment as to the Complaint on file herein is hereby granted because § 17500 et seq. of the Business and Professions Code is void on its face and unconstitutional because said section violates the First and Fourteenth Amendments to the U.S. Constitution and Article 1 § 2 of the California Constitution.

"1. Section 17500 of the Business and Professions Code is unconstitutional because a civil monetary penalty may be levied

against a person who negligently disseminates false or misleading information in an advertisement. It is the court's ruling that a false advertising statute (§ 17500) may constitutionally impose civil monetary penalties only if it is limited to situations where the advertiser knows the statements to be false or misleading or where the advertiser makes the statement with reckless disregard for whether or not the advertisement is false or misleading.

"2. Section 17536 of the California Business and Professions Code is unconstitutional on its face because it imposes an excessive fine in violation of the First, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 2 and Section 17 of the California State Constitution.

"3. Section 17200 of the California Business and Professions Code (formerly § 3369 of the California Civil Code) is unconstitutional as applied to the complaint in the instant case in that it defines an unlawful and unfair business practice to include a violation of Section 17500 of the Business and Professions Code, and because it imposes punishment by way of a civil monetary fine for the negligent publication of false or misleading advertising under the general definition of unfair competition.

"IT IS FURTHER ORDERED that should § 17500 of the Business and Professions Code be held constitutional by an appellate court and § 17200 of the Business and Professions Code (formerly § 3369 of the California Civil Code) to be held by an appellate court to be constitutional as applied to the Complaint herein, this Court does hereby grant the following order to deem certain issues to be without controversy.

"Issues Without Controversy

"1. The First and Fourteenth Amendments to the United States Constitution and Article 1 § 2 of the Constitution of the State of California, as applied to Business and Professions Code § 17500 and § 17200 et seq. (formerly § 3369 of the Civil Code et seq.), require Plaintiff to prove that Defendant disseminated the advertisements at issue with the knowledge that they were false or misleading or with reckless disregard for whether or not the advertisements were false or misleading, as a precondition to imposing any civil penalty. Proof by Plaintiff of a lack of the exercise of reasonable care by Defendants in the publishing of false or misleading advertising is insufficient as a matter of law to support a monetary judgment for Plaintiff.

"2. A maximum of one violation of Business and Professions Code § 17500 and § 17200 (formerly § 3369 of the Civil Code) occurs when an advertisement appears in one day's edition of a newspaper,

[1, 2] The pendency of a cross-complaint for damages for alleged violation of defendants' constitutional rights precluded entry of a judgment on the complaint in favor of defendants. Since an order granting summary judgment is nonappealable, the People seek its review by extraordinary writ.[6]

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and as such, since a maximum of eight publications occurred, a maximum of $40,000 liability exists in the case at bar.

"Denial of Defense Motion for an Order Deeming an Issue Without Controversy.

"The Court denied the defense motion to deem the following issue without controversy:

"3. Plaintiff must prove that the Defendant violated Business and Professions Code § 17500 and § 17200 (formerly § 3369 of the Civil Code) by clear and convincing evidence.

"4. This Court further finds that the issues presented by the Defendant's Motion for Summary Judgment are issues of First Impression in this state and that the court's ruling raises serious questions about the state's ability to curb false and misleading advertising. This Court believes that these issues should be determined by the apellate courts with all due dispatch because they are matters of widespread importance."

[6]Mandamus is an appropriate means of reviewing an otherwise nonappealable order of a trial court where the issue presented is one of law and it is in the public interest to have a prompt determination of the question presented. (*Brown v. Superior Court,* 5 Cal.3d 509, 514-515, 96 Cal. Rptr. 584, 487 P.2d 1224; *Randone v. Appellate Department,* 5 Cal.3d 536, 542-543, 96 Cal. Rptr. 709, 488 P.2d 13; *City of Huntington Beach v. Superior Court,* 78 Cal. App.3d 333, 339, 144 Cal. Rptr. 236.) The statutes whose validity have been brought into question by the trial court's order are the basic tools of the Attorney General and district attorneys in combating consumer fraud. Prompt resolution of the questions raised is therefore in the public interest. By issuing an alternative writ, we necessarily determined that the People have no other adequate remedy and that this is a proper case for the exercise of our original jurisdiction through the prerogative writ. (*People ex rel. Younger v. County of El Dorado,* 5 Cal.3d 480, 492, 96 Cal. Rptr. 553, 487 P.2d 1193; *City of Huntington Beach v. Superior Court, supra,* 78 Cal. App.3d 333, 339, 144 Cal. Rptr. 236.)

The People contend that the statutes as applied in the instant case do not offend the free speech guarantees of the United States Constitution or the state Constitution and that the trial court's order should be set aside in its entirety. Defendants respond that the trial court correctly interpreted, defined and applied the First Amendment protection extended to commercial speech and that the petition should therefore be denied. For reasons we shall explain, we have concluded that the statutes as applied in the case at bench do not abridge defendants' free speech rights and further that the trial court erred in its perception of the proper method of determining the number of statutory violations of sections 17500 and 17200 for the dissemination of a false or misleading advertisement through newspapers. We have therefore concluded that a peremptory writ of mandate should issue commanding the trial court to vacate its order in its entirety.

I.

Before addressing the issues presented, we briefly review the statutes in question.

Section 17500 is the major California legislation designed to protect consumers from false or deceptive advertising. It is derived from the 1915 version of the former Penal Code section 654a which in turn was based on the so-called "Printers' Ink Model Statute" drafted in 1911 at the behest of the advertising journal of the same name.[7] (Note, *The Regulation of Advertising* (1956) 56 Colum.L.Rev. 1019, 1058-1059; Note, *Enforcing California's False Advertising Law: A Guide to Adjudication* (1974) 25 Hastings L.J. 1105, 1106.) The "Printers' Ink Model" made it a misdemeanor to place before the

[7]The "Printer's Ink Model," either in its original form or as modified, has been adopted in 44 states and the District of Columbia. (Note, *supra,* 25 Hastings L.J. 1105, 1106, fn. 9.)

public any advertisement containing "any assertion, representation or statement of fact which is untrue, deceptive or misleading"; proof of intent to deceive or knowledge of the improper character or the advertisement was not required. (Note, *supra,* 56 Colum.L.Rev. 1019, 1058, fn. 245, 1059.) The model statute made advertisers absolutely liable for what they said in the advertisement.

In adopting the "Printers' Ink Model" in California, the Legislature added the requirement that the false or misleading character of the advertisement either be known or in the exercise of reasonable care should have been known by the advertiser. (Stats. 1915, ch. 634, pp. 1252-1253.) Section 17500 continues to carry the same qualification; the section makes it unlawful for any person to disseminate any statement concerning the product or service advertised "which is untrue or misleading, *and which is known, or which by the exercise of reasonable care should be known,* to be untrue or misleading." (Emphasis supplied.)

The Attorney General, district attorneys, and certain other designated public legal officers are empowered to seek and obtain injunctive relief against violations of section 17500 (§ 17535) and section 17200 (§ 17203) and to recover civil penalties on behalf of the government in an amount not to exceed $2,500 for each violation of the false advertising statute (§ 17536) and for each violation of the unfair competition statute (§ 17206). A violation of the false advertising statute is also made a misdemeanor. (§ 17500).

Section 17536 providing civil penalties for violation of the false advertising statute was added in 1965 (Stats. 1965, ch. 827, p. 2419) because injunctions and misdemeanor prosecutions were found to be inadequate weapons with which to combat false advertising. (*People v.*

Superior Court (Jayhill Corp.), 9 Cal. 3d 283, 288-289, 107 Cal. Rptr. 192, 507 P.2d 1400; Note, *supra* 25 Hastings L.J. 1105, 1107-1108; Review of Selected 1965 Code Legislation (Cont. Ed. Bar 1965) p. 21.) As in the case of false advertising, the injunctive remedy was found to be an ineffective deterrent against violations of the unfair competition law. (*Review of Selected 1972 California Legislation,* 4 Pac. L.J. 335, 342.)

II.

In order to focus upon the precise First Amendment argument advanced by defendants, we make the following preliminary observations:

[3, 4] Defendants' advertisement was pure commercial speech and defendants do not contend otherwise; the advertisement did not editoralize on any political, cultural, social or other subject. Thus, we are not confronted with the difficult task of drawing a distinction between "talk for profit, and talk for other purposes" or of determining the degree of First Amendment protection which should be accorded speech embodying both qualities. (See Tribe, American Constitutional Law (1978) p. 656.) Further, defendants agree that the state has a compelling interest in protecting the public and business competitors from being victimized by false and deceptive advertising. "Protection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society." (*Vasquez v. Superior Court,* 4 Cal.3d 800, 808, 94 Cal. Rptr. 796, 484 P.2d 964, 968; *Fletcher v. Security Pacific National Bank,* 23 Cal.3d 442, 451, 153 Cal.Rptr. 28, 591 P.2d 51.) Defendants also concede that an injunction against dissemination of false and misleading commercial advertising does not offend First Admentment rights of the advertiser. (*People v. Columbia Research Corp.,* 71

Cal.App.3d 607, 614, 139 Cal.Rptr. 517, cert. den. 434 U.S. 904, 98 S.Ct. 302, 54 L.Ed.2d 191.)

Defendants' attack is upon the monetary sanctions authorized by section 17536 and section 17206 for negligently disseminating false or deceptive advertising. Their arguments takes the following form: First, since commercial speech is protected by the First Amendment, regulation of such speech must be accomplished by the means least likely to inhibit the exercise of the protected right; that imposition of the civil sanctions authorized by the statutes would have a chilling effect on the exercise of the protected right; and that injunctive relief, civil action by defrauded consumers or injured competitors, class actions on behalf of victimized consumers, and enforcement of governmental rules and regulations, state and federal, pertaining to standards of business and professional practices provide adequate public and competitor protection against false or misleading advertising. Defendants therefore maintain that section 17500 is unconstitutional on its face and that section 17200 is unconstitutional as applied. It is further their position that should sections 17500 and 17200 be determined to be constitutional, civil penalties may only be imposed for dissemination of false advertising with knowledge of the improper character of the advertising or in reckless disregard thereof.

[5] Defendants' contentions assume that since commercial speech has been brought under the protective umbrella of the First Amendment, it is perforce entitled to the same degree of protection as noncommercial speech. However, the decisions of the United States Supreme Court extending First Amendment protection to commercial speech dispel any such assumption.

On the theory that societal interest in the free flow of commercial information if indispensable to the proper

allocation of resources in a free enterprise system, the United States Supreme Court has in a series of recent decisions repudiated the notion expressed in *Valentine v. Chrestensen,* 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262, that pure commercial speech is unprotected by the First Amendment (*Bates v. State Bar of Arizona,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810; *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155; *Va. Pharmacy Bd. v. Va. Consumer Council,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346; *Bigelow v. Virginia,* 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600), and has held that advertising which "does' no more than propose a commercial transaction' " is deemed an exercise of a First Amendment right (*Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. 748, 771, fn. 24, 96 S.Ct. 1817, 1830 fn. 24, 48 L.Ed. 2d 346, quoting *Pittsburgh Press Co. v. Human Relations Comm'n.,* 413 U.S. 376, 385, 93 S.Ct. 2553, 37 L.Ed.2d 669). In extending First Amendment protection to commercial speech in the seminal *Va. Pharmacy Bd.* case, however, the high court hastened to add that commercial speech is subject to reasonable state regulations and that among those which "are surely permissible" are restraints on false, deceptive or misleading advertising. (*Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. 748, 770-771, 96 S.Ct. 1817, 46 L.Ed.2d 346.) The court foresaw no First Amendment impediment to the exercise of the state's power to deal effectively with false or misleading commercial speech. "The First Amendment, as we construe it today," said the court, "does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely." (*Id.,* at pp. 771-772, 96 S.Ct. at p. 1830; accord *Friedman v. Rogers,* ____U.S.____, 99 S.Ct. 887, 893-894, 59 L.Ed.2d 100; *Bates v. State Bar of Arizona, supra,* 433 U.S. 350, 383, 97 S.Ct. 2691, 53 L.Ed.2d 810.)

The Supreme Court has consistently emphasized that in rejecting the notion that commercial speech is unprotected, the court was not elevating commercial speech to the same level on the scale of First Amendment values it has accorded other types of speech and has cautioned that its decision dealing with more traditional noncommercial speech are not to be automatically applied to commercial speech. (*Ohralik v. Ohio State Bar Assn.,* 436 U.S. 447, 462, fn. 20, 98 S.Ct. 1912, 56 L.Ed.2d 444; *Bates v. State Bar of Arizona, supra,* 433 U.S. 350, 380-381, 97 S.Ct. 2691, 53 L.Ed.2d 810; *Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. 748, 771, fn. 24, 96 S.Ct. 1817, 48 L.Ed.2d 346.) Thus, in *Ohralik,* the court summarized its view concerning the degree of First Amendment protection it intended to extend to commercial speech: "In rejecting the notion that such [commercial] speech "is wholly outside the protection of the First Amendment.' *Virginia Pharmacy,* 425 U.S. at 761, 96 S.Ct. 1817, 48 L.Ed.2d 346, we were careful not to hold 'that it is wholly indifferentiable from other forms' of speech. 425 U.S. at 771 n. 24, 96 S.Ct. 1817, 48 L.Ed.2d 346. We have not discarded the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. *Ibid.* To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." (*Id.,* at pp. 455-456, 98 S.Ct., at p. 1918.)

The high court has justified the different degree of protection accorded commercial speech as compared to other varieties of speech on the "common-sense" difference between them. "The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the sine qua non of commercial profits, there is little likelihood of it being chilled by proper regulations and foregone entirely.

"Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker. Compare *New York Times Co. v. Sullivan, supra,* with *Dun & Bradstreet, Inc. v. Grove, supra.* They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive. [Citations.] They may also make inapplicable the prohibition against prior restrains. [Citations.]" (*Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. 748, 771, fn. 24, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346.)

In Justice Stewart's concurring opinion in *Va. Pharmacy Bd.,* he emphasized the fact that the "advertiser's access to the truth about his product and its price substantially eliminates any danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression" and that therefore there is "little need to sanction 'some falsehood in order to protect speech that matters.' " (*Id.,* conc. opn. Stewart, J., pp. 777-778, 96 S.Ct., p. 1833.) Justice Stewart's view was echoed in *Bates v. State Bar of Arizona, supra,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810, where the court said: "Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech. [Citation.] And any concern that strict requirements for truthfulness will undesirably inhibit spontaneity seems inapplicable because commercial speech generally is calculated. Indeed, the public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena." (*Id.,* at p. 383, 97 S.Ct., at pp. 2708-2709.)

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[6-8] We conclude that a state regulation providing for the imposition of civil monetary penalties for the negligent dissemination of untruthful or misleading advertising does not offend the First Amendment. If knowledge of falsity or reckless disregard of the truth were made an essential element of proof in order to invoke the sanction, difficulty of proof would frustrate the state's most effective weapon against consumer fraud. The injury to consumers victimized by false or deceptive advertising is no less when it results from negligence than when knowingly or recklessly made. The constitutional protection extended to commercial speech "Does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely." (*Va. Pharmacy Bd. v. Va. Consumer Council, supra,* 425 U.S. 748, 772, 96 S.Ct. 1817, 1831, 48 L.Ed.2d 346.) We hold that sections 17500 and 17200 are neither facially, nor as applied, violative of the First Amendment.

[9] Although the trial judge ruled that the statutes in question violated the free speech clause of article I, section 2 of the California Constitution [8] as well as the First Amendment, defendants make no contention that commercial speech enjoys greater protection under the California Constitution than it does under the First Amendment. Our Supreme Court has in certain contexts declared the free speech clause of the California Constitution to be " 'more definitive and inclusive than the First Amendment' " (*Robins v. Pruneyard Shopping Center,* 23 Cal.3d 899, 908, 153 Cal. Rptr. 854, 859, 592 P.2d 341, 346, quoting *Wilson v. Superior Court,* 13 Cal.3d 652, 658, 119 Cal. Rptr. 468, 532 P.2d 116), but there has been no pronouncement by our high court that the California Constitution affords pure commercial speech greater protection than that accorded by the First Amendment.

III.

The remaining issues concern the validity and interpretation of section 17536 and section 17206 providing for civil penalties of up to $2,500 for each violation of the respective statute.

[10] The decision to provide for the imposition of a monetary sanction for a violation of a regulatory statute is a matter resting well within the discretion of the Legislature. A "state may impose reasonable penalties as a means of securing obedience to statutes validly enacted under the police power." (*Hale v. Morgan,* 22 Cal.3d

[8]California Constitution, article 1, section 2, provides:

"Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

388, 398, 149 Cal. Rptr. 375, 381, 584 P.2d 512, 518.) "Imposition of civil penalties has, increasingly in modern times, become a means by which legislatures implement statutory policy." (*Id;* see *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions* (1979) 92 Harv.L.Rev. 1227, 1369.)

The People contend that for the purpose of fixing the civil penalties recoverable under section 17536 and section 17206 the number of violations is to be determined by the number of persons to whom the misrepresentations were made, citing *People v. Superior Court (Jayhill Corp.), supra,* 9 Cal.3d 283, 107 Cal. Rptr. 192, 507 P.2d 1400, and *People v. Bestline Products, Inc.,* 61 Cal. App.3d 879, 132 Cal. Rptr. 767. In the case of a false newspaper advertisement, it is urged that the circulation of the newspaper should be the measure of the number of violations.

The trial court ruled that the People's interpretation of section 17536 would render it facially unconstitutional as authorizing the imposition of excessive penalties. Accordingly, the court determined that if the statute is to be upheld, each appearance of an advertisement in a single edition of a newspaper can constitute but a single violation of section 17500 and of section 17200 for which a maximum penalty of $5,000 may be imposed. Since the advertisement appeared in newspapers on eight occasions, the court ruled that the maximum penalties recoverable would be $40,000. The People contend that the trial court's interpretation is in defiance of the rule established by *People v. Superior Court (Jayhill Corp.), supra,* and*People v. Bestline Products, Inc., supra.*

People v. Superior Court (Jayhill Corp.), supra, 9 Cal.3d 283, 107 Cal. Rptr. 192, 507 P.2d 1400, involved

door-to-door solicitation by book sellers. The Attorney General contended that each misrepresentation constituted a separate violation subject to the maximum $2,500 penalty. The Supreme Court rejected the contention noting that since not less than 25 misrepresentations were alleged to have been made to each prospect, under the Attorney General's theory defendants could be liable for $62,500 for each person solicited. The court declared that "it is unreasonable to assume that the Legislature intended to impose a penalty of this magnitude for the solicitation of one potential customer. Rather, we believe the Legislature intended that the number of violations is to be determined by the number of persons to whom the misrepresentations were made, and not by the number of separately identifiable misrepresentations involved. Thus, regardless of how many misrepresentations were allegedly made to any one potential customer, the penalty may not exceed $2,500 for each customer solicited by a defendant." (*Id.*, at p. 289, 107 Cal. Rptr., at p. 196, 507 P.2d, at p. 1404).[9]

People v. Bestline Products, Inc., supra, 61 Cal. App.3d 879, 132 Cal. Rptr. 767, also relied upon by the People, involved false representations made in connection with a marketing scheme for the sale of household cleaning products. The court found that some 10,000 distributors attended meetings at which misrepresentations were made and that 3,000 of them responded by becoming distributors and paying $3,000 each for merchandise. The trial court imposed a civil penalty of one million dollars against the corporate defendants and $500,000 against five individuals. On appeal, the reviewing court held that while

[9]The "per victim" rather than a "per culpable statement" basis was also approved in *People v. Witzerman,* 29 Cal. App.3d 169, 180, 105 Cal. Rptr. 284, as the most reasonable interpretation of section 17536.

the *Jayhill* court may not have intended to establish a test for determining the number of violations of section 17500 under all circumstances, it was not unreasonable to find the corporate defendants guilty of at least 3,000 violations and to impose a civil penalty of approximately $330 per violation. Considering the fact that the $3,000 each for a total of nine million dollars, the court held that the penalty was entirely reasonable.

The People maintain that *Jayhill* stands for the proposition that the number of violations is to be determined by the number of persons to whom the representations were made so that the number of violations resulting from a false advertisement in a newspaper may theoretically be equated with the circulation of the paper. As the *Bestline Products* court indicated, it is unlikely that *Jayhill* intended to establish a test for determining the number of violations applicable to all situations. (*People v. Bestline Products, Inc., supra,* 61 Cal. App.3d 879, 923, 132 Cal. Rptr. 767.) *Jayhill* certainly does not suggest use of the newspaper circulation as the number of violations for false advertising in a newspaper.

If the People's theory of determining the number of violations were applied in the case at bench, a false advertisement published in the Los Angeles Times which has a circulation in excess of one million could result in more than one million violations for each edition with a potential civil penalty in excess of two and a half billion dollars under each statute. In keeping with the observations of the Supreme Court in *People v. Superior Court (Jayhill Corp.), supra,* 9 Cal.3d 282, 289, 107 Cal. Rptr. 192, 507 P.2d 1400, it is "unreasonable" to assume that the Legislature contemplated penalties of that magnitude for a false advertisement in a single edition of a newspaper. To so interpret the statute would rend it violative of the due process prohibition against "oppressive" or "unreason-

able" statutory penalties. (*Hale v. Morgan, supra,* 22 Cal.3d 388, 399, 149 Cal. Rptr. 375, 584 P.2d 512.) Common sense tells us that every newspaper subscriber does not read all of the advertisements published in the paper and could hardly be termed "a person solicited" in the sense of one personally solicited by a door-to-door salespersons.

[11, 12] At the same time, however, we cannot agree with the trial court that dissemination of a false or deceptive advertisement through a single edition of a newspaper can constitute but one violation of each statute as a matter of law. We believe a reasonable interpretation of the statute in the context of a newspaper advertisement would be that a single publication constitutes a *minimum* of one violation with as many additional violations as there are persons who read the advertisement or who responded to the advertisement by purchasing the advertised product or service or by making inquiries concerning such product or service. Violations so calculated would be reasonably related to the gain or the opportunity for gain achieved by the dissemination of the untruthful or deceptive advertisement. While the method by which the number of violations may be proved is not before us, it would appear that it might well include expert testimony and circumstantial evidence. We do not see the difficulty of proof to be so onerous as to undermine the effectiveness of the civil monetary penalty as an enforcement tool.

[13, 14] The People say that in arguing that the number of violations could be based upon the circulation of the newspaper, it is not suggesting that the court must so calculate the number of violations but only that it is a theoretical possibility. It is urged that the court would in any event only be empowered to impose a reasonable penalty. The question before us, however, is not the reasonableness of the penalty imposed, but the interpretation to be placed on the term "each violation" in the context of a newspaper advertisement. Even under our interpretation of the statute, the trial court must manifestly act reasonably in light of all pertinent factors including the kind of misrepresentations or deceptions, whether they were intentionally made or the result of negligence, the circulation of the newspaper, the nature and extent of the public injury, and the size and wealth of the advertising enterprise.

DISPOSITION

Let a peremptoryy writ of mandate issue commanding the trial court to vacate its "Order granting defendants' motion for summary judgment and in the alternative determining issues without controversy" and to take further proceedings in the case consistent with the views herein expressed.

GARDNER, P. J., and MORRIS, J., concur.

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1192

FOREST E. OLSON, INC. and COLDWELL, BANKER AND CO.,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

Brief of the Attorney General of the State of California on behalf of Respondent in Opposition to the Petition for Writ of Certiorari.

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IN THE

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FOREST E. OLSON, INC. and COLDWELL, BANKER AND CO.,
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vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

Brief of the Attorney General of the State of California on Behalf of Respondent in Opposition to the Petition for Writ of Certiorari.

The Attorney General of the State of California appears before this Court as *amicus curiae* in opposition to the petition of certiorari filed by petitioners Forest E. Olson, Inc. and Coldwell, Banker and Co. Petitioners seek review of a writ of mandate issued by the California Court of Appeal[1] requiring the trial court to vacate its ruling that California's false advertising laws are unconstitutional because they authorize the imposition of civil monetary and criminal sanctions for the negligent dissemination of untrue or misleading advertising. The Supreme Court of California denied a petition for hearing.

[1]The opinion is printed *sub nomine People of the State of California v. Superior Court* (*Olson*), 96 Cal.App.3d 181, 157 Cal.Rptr. 628 (1979) and is appended to the Petition for Certiorari.

I.

QUESTION PRESENTED.

The question presented by petitioners is whether the imposition of a civil monetary or criminal penalty for the negligent dissemination of false or misleading advertising creates a constitutionally impermissible chilling effect on the exercise of purely commercial speech. Petitioners contend that the First Amendment, as interpreted by this Court in *New York Times v. Sullivan,* 376 U.S. 254 (1964) mandates that only false and misleading advertising disseminated with malice, *i.e.* with knowledge or with reckless disregard of the advertising's false or misleading character, may be constitutionally subject to sanction.

II.

REASON FOR DENYING THE WRIT.

THE CALIFORNIA COURT OF APPEAL PROPERLY CONSIDERED AND CORRECTLY APPLIED PRIOR DECISIONS OF THIS COURT WHICH CLEARLY DISPOSE OF THE QUESTION PRESENTED.

A. False or Misleading Advertising Is Clearly Not Protected From Regulation by the First Amendment.

In concluding that commercial speech was entitled to some First Amendment protection, this Court recognized that such speech furthers "the societal interest in 'the free flow of commercial information' " which is necessary to maintain the vitality of a free and open market economy. *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 783 (1978). *See Friedman v. Rogers,* 440 U.S. 1, 8-9 (1979); *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 92 (1977); *Virginia Pharmacy Board v. Virginia Consumer Council,* 425 U.S. 748, 765 (1976).

This Court, however, explicitly acknowledged that commercial speech which is false or misleading corrupts the flow of commercial information and vitiates the ability of the public to make intelligent, well informed economic decisions. As the Supreme Court has noted,

> "the public and private benefits from commercial speech derive from confidence in its accuracy and reliability." *Bates v. State Bar of Arizona,* 433 U.S. 350, 383 (1977).

Accordingly, the Court emphasized that:

> "Untruthful speech, commercial or otherwise, has never been protected for its own sake. [Citations omitted.] Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee *no obstacle* to a State's

dealing effectively with this problem. [Footnote omitted.] *The First Amendment*, as we construe it today, *does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.*'' *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. at 771-72. (Emphasis added.)

Accord Friedman v. Rogers, supra, 440 U.S. at 9.

Accordingly, this Court has held that:

> ''Advertising that is false, deceptive, or misleading *of course* is subject to restraint.'' *Bates v. State Bar of Arizona*, 433 U.S. at 383. (Emphasis added.)

This Court has even upheld restrictions on commercial speech which in fact was not misleading but whose use ''enhances the opportunity for misleading practices.'' *Friedman v. Rogers, supra*, 440 U.S. 1, 15.

B. Commercial Speech Will Not Be Impermissibly Chilled by the State's Prohibition on All False and Misleading Statements.

Notwithstanding the unmistakable exclusion under the decisions of this Court of false or misleading statements from the realm of First Amendment protection, petitioners contend that the possibility that penalties may be imposed for negligently published false and misleading advertising will dissuade advertisers from exercising their right to commercial speech and that, therefore, this Court's ruling in *New York Times v. Sullivan, supra*, requires the State to tolerate negligently disseminated false or misleading advertising to avoid chilling advertisers from engaging in their First Amendment right to commercial speech. Petitioners' contention is predicated on two erroneous assumptions: that commercial speech dwells on the same plateau of protection as all other protected speech and that the rationale of the protection established in *New York Times* for speech on

public, social, and political issues is applicable to speech that ''does 'no more than propose a commercial transaction.' '' *Virginia Pharmacy Board v. Virginia Consumer Council, supra*, 425 U.S. 748, 771 n. 24. These assumptions have been rejected by the decisions of this Court and by the California Court of Appeal in properly applying those decisions.

1. Commercial Speech Is Not Accorded Equivalent Protection to Other Forms of Speech.

In acknowledging that commercial speech is entitled to some First Amendment protection, this Court never established that commercial speech is entitled to the same panoply of protections afforded to other forms of speech:

> ''In rejecting the notion that such speech 'is wholly outside the protection of the First Amendment,' *Virginia Pharmacy, supra*, at 761, we were careful not to hold 'that it is wholly undifferentiable from other forms' of speech. 425 U.S., at 771 n. 24. We have not discarded the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. *Ibid.* . . . [W]e instead have afforded commercial speech a *limited measure of protection*, commensurate with its *subordinate position in the scale of First Amendment values*, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.'' *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455-56 (1978). (Emphasis added.)

Indeed, this Court has held that:

> ''Because of the special character of commercial speech and the relative novelty of First Amendment protection for such speech, we act with caution in con-

fronting First Amendment challenges to economic legislation that serves legitimate regulatory interests. *Our decisions dealing with more traditional First Amendment problems do not extend automatically to this as yet uncharted area*. [citation] (overbreadth analysis not applicable to commercial speech). When dealing with restrictions on commercial speech we *frame our decisions narrowly*, 'allowing modes of regulation [of commercial speech] that might be impermissible in the realm of non-commercial expression.' " *Friedman v. Rogers, supra*, 440 U.S. 1, 10-11 n.9. (Emphasis added.)

Thus, the doctrine of *New York Times* does not perforce extend to the arena of commercial speech merely because that speech has limited Constitutional protection. Moreover, the decisions of this Court have already recognized the "commonsense" differences between advertising and traditional forms of protected speech which militate against the application of *New York Times* to commercial speech.

2. The Rationale of New York Times v. Sullivan Is Inapplicable to Commercial Speech.

The case of *New York Times v. Sullivan, supra*, involved a paid political advertisement concerning the civil rights struggle in the South and the defense of Dr. Martin Luther King. The advertisement was assailed under the Alabama libel law, and the case was considered "against the background of a profound national commitment" to vigorous, unrestrained public debate which might result in vitriolic attacks on public officials. 376 U.S. at 270. The Court held that state libel laws protect public figures and holders of governmental office from defamatory falsehoods only to the extent that the falsehoods were uttered with knowledge of their falsity or reckless disregard of their truth. *Id.* at 280-81.

The Court reasoned that, within the context of spirited and open political criticism, an

> "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive. . . .' " *Id.* at 271-72.

Consequently, the Court extended protection to negligently made false statements not because of their merit but because the self-censorship resulting from the fear of liability for such "inevitably" made negligent false political statements would intolerably constrict the free flow of public debate and criticism of public figures. *Id.* at 279.

Nonetheless, this Court has never held that *New York Times* is an iron rule applicable in all instances of traditionally protected speech or even in all instances of defamation. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). (*New York Times* malice standard not applicable in case of defamation of private individual). Indeed, decisions of this Court have clearly indicated that the prohibition on false or misleading advertising does not chill the exercise of commercial speech.

In *Virginia Pharmacy Board*, this Court declared:

> "commercial speech may be more durable than other kinds. Since advertising is the sine qua non of commercial profits, *there is little likelihood of its being chilled by proper regulation and forgone entirely*.
>
> "Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker." *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. at 771 n. 24.

See Friedman v. Rogers, supra, 440 U.S. at 410.

In his concurring opinion to *Virginia Pharmacy Board*, cited approvingly in *Young v. American Mini Theatres*, 427 U.S. 50, 69 n. 32 (1976) and again in *Friedman v. Rogers*, 440 U.S. at 410, Mr. Justice Stewart specifically focused on the significant difference between commercial and ideological speech. He remarked that the reasoning in the libel cases actually indicates that control of untrue advertising claims is proper:

> "The principles recognized in the libel decisions suggest that government may take broader action to protect the public from injury produced by false or deceptive price or product advertising than from harm caused by defamation. In contrast to the press, which must often attempt to assemble the true facts from sketchy and sometimes conflicting sources under the pressure of publication deadlines, the commercial advertiser generally knows the product or service he seeks to sell and is in a position to verify the accuracy of his factual representations before he disseminates them. *The advertiser's access to the truth about his product and its price substantially eliminates any danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression. There is, therefore, little need to sanction 'some falsehood in order to protect speech that matters.'* " 425 U.S. at 777-78 (Emphasis added.)

Justice Stewart concluded that:

> "Indeed, the elimination of false and deceptive claims serves to promote the one facet of commercial price and product advertising that warrants First Amendment protection—its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking." *Id.* at 781.

Accord Friedman v. Rogers, supra. See National Commission on Egg Nutrition v. FTC, 570 F.2d 157, 161-63 (7th Cir. 1977), *cert. den.* (1978) 99 S.Ct. 86 in which the Court of Appeals rejected the application of *New York Times* to commercial advertising.)

This viewpoint was reiterated in *Bates v. State Bar of Arizona, supra,* in which the Court declared that state regulation of false or misleading statements would not chill the exercise of calculated commercial advertising. The Court stated:

> ". . . Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech. [citations omitted] And any concern that strict requirements for truthfulness will undesirably inhibit spontaneity seems inapplicable because commercial speech generally is calculated. Indeed, the public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Thus, the leeway for *untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena.*" 433 U.S. at 383. (Emphasis added.)

Accord Friedman v. Rogers, 440 United States at 409-10. As the Court ruled long ago,

> "It is not difficult to choose statements, designs, and devices which will not deceive." *United States v. 95 Barrels, More or Less, Alleged Apple Cider Vinegar*, 265 U.S. 438, 443 (1924).

In short, "There is no constitutional right to disseminate false or misleading statements." (*E.F. Drew & Co. v. FTC*, 235 F.2d 735, 740 (2d Cir. 1956), *cert. den.*, 352 U.S. 969

(1957) (case cited approvingly in *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. at 771 n. 24).)

Consequently, this Court gave specific approval to a Virginia *strict liability statute* (Va. Code Ann. § 18.2-216)[2] prohibiting the dissemination of false or misleading

---

[2]Va. Code Ann. § 18.2-216 provides:

"Any person, firm, corporation or association who, with intent to sell or in anywise dispose of merchandise, securities, service or anything offered by such person, firm, corporation or association, directly or indirectly, to the public for sale or distribution or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or any interest therein, makes, publishes, disseminates, circulates or places before the public, or causes, directly or indirectly to be made, published, disseminated, circulated or placed before the public, in a newspaper or other publications, or in the form of a book, notice, handbill, poster, blueprint, map, bill, tag, label, circular, pamphlet or letter or in any other way, an advertisement of any sort regarding merchandise, securities, service, land, lot or anything so offered to the public, which advertisement contains any promise, assertion, representation or statement of fact which is untrue, deceptive or misleading, or uses any other method, device or practice which is fraudulent, deceptive or misleading to induce the public to enter into any obligation, shall be guilty of a Class 1 misdeameanor. The words 'untrue, deceptive and misleading,' as used in this section, shall be construed as including (i) the advertising in any manner by any person of any goods, wares or merchandise as a bankrupt stock, receiver's stock or trustee's stock, if such stock contains any goods, wares or merchandise put therein subsequent to the date of the purchase by such advertiser of such stock, and if such advertisement of any such stock fail to set forth the fact that such stock contains other goods, wares or merchandise put therein, subsequent to the date of the purchase by such advertiser of such stock in type as large as the type used in any other part of such advertisement, including the caption of the same, it shall be a violation of this section; and (ii) the use of any writing or document which appears to be, but is not in fact a negotiable check, negotiable draft or other negotiable instrument notwithstanding the fact that its nonnegotiability is indicated on the writing or document."

The statute provides that its violation is a misdemeanor which is punishable by up to 1 year in jail and $1,000 per violation. (*See* Va. Code Ann. § 18.2-11(a).) The Virginia statutory scheme also provides for injunctive relief in actions brought by public prosecutors and creates private remedies for damages and attorney's fees. (Va. Code Ann. § 59.1-68.2-§ 59.1-68.5.)

advertising. *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. at 772. Moreover, the Court has declared that the well established authority of the Federal Trade Commission to prohibit false and misleading statements regardless of the intent of the disseminator (*see, e.g., FTC v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1934)) remains unimpaired by the recognition of a limited constitutional protection for commercial speech. (*See Young v. American Mini Theatres*, 427 U.S. at 68 n. 31; *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. at 771 n. 24.)

Since the state may fully regulate the dissemination of false or misleading advertising because it is not protected by the First Amendment either directly or indirectly to prevent the chilling of the exercise of otherwise protected commercial speech, the state legislature may reasonably select the means by which the proscribed conduct is to be punished. *See, e.g., Warden v. Marrero*, 417 U.S. 653, 664 (1974); *Arroyo v. United States*, 359 U.S. 419, 424 (1959); *Weems v. United States*, 217 U.S. 349, 379 (1910); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). Petitioners have not and cannot demonstrate the impropriety of the civil penalty or misdemeanor sanction to the offense of false advertising.

Conclusion.

The Petition for a Writ of Certiorari contains no issue that has not been considered by this Court in its seminal cases on commercial speech. The California Court of Appeal properly applied the law as interpreted by this Court. No conflicting authorities have been mentioned by petitioners to question the correctness of the Court of Appeal's ruling. Moreover, petitioners have failed to demonstrate how this Court's consideration of this case will in any way develop

or elucidate clear principles established in *Friedman, Bates,* and *Virginia Pharmacy Board*. Accordingly, amicus respectfully contends that no issue in this case is sufficiently novel or significant to warrant this Court's exercise of its discretionary jurisdiction by granting the writ.

Respectfully submitted,

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79-1192

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FOREST E. OLSON, INC., and
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Petitioners,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE (CALIFORNIA, REAL PARTY IN INTEREST),

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,
4th APPELLATE DISTRICT, DIVISION 2

RESPONDENT'S BRIEF IN OPPOSITION

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79-1192

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THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE (CALIFORNIA, REAL PARTY IN INTEREST),

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the California Fourth District Court of Appeals herein is reported in the California Official Reports at 96 Cal. App.3d 181 and appears in the appendix to the Petition for Writ of Certiorari filed herein. No opinion was rendered by the Supreme Court of the State of California in denying tne petition for hearing filed by petitioners.

JURISDICTION

On March 8, 1979 the trial court in the case at bar declared the California false advertising law (California Business and Professions Code Section 17500 *et seq.*) unconstitutional on its face because the statutes involved

permitted recovery by the District Attorney in a civil action of civil penalties, upon a showing that the advertisement was false and/or misleading and was published as a result of the advertiser's negligence. The trial court thereupon dismissed the civil complaint and granted a motion for summary judgment against plaintiff, the People of the State of California.

On August 21, 1979 the California Fourth District Court of Appeals Issued a peremptory writ of mandate and/or prohibition to the respondent trial court directing the trial court to vacate its order declaring Business and Professions Code Section 17500 *et seq.* unconstitutional. On November 15, 1979 the California Supreme Court denied a petition for hearing.

Respondent concedes that this Court has jurisdiction to decide the questions presented pursuant to 28 U.S.C. Section 1257 (2) and (3) in light of *Cox Broadcasting v. Cohn,* 420 U.S. 469 (1975).

QUESTION PRESENTED

Can the State of California properly enact a statutory scheme prohibiting false and misleading advertising, enforced by civil monetary penalties, if there is a showing that the information placed in the advertisement was negligently acquired and disseminated to the members of the public?

STATUTES INVOLVED

The following statutes, codified in the California Business and Professions Code, are collectively referred to as the "Statutes":

Business and Professions Code Section 17200 (formerly at *Civ. Code Section* 3309 *et seq.*):

"As used in this chapter, unfair competition shall mean and include unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code."

Business and Professions Code Section 17206:

"Any person who violates any provision of this chapter shall be liable for a civil penalty not to exceed Two Thousand Five Hundred Dollars ($2,500) for each violation . . . "

Business and Professions Code Section 17500:

"It is unlawful for any person, firm, corporation or association, of any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation or in any other manner or means whatever, any statement, professional or otherwise, concerning such real property or services or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, or for any such person, firm or corporation to so make or disseminate or cause to be made or disseminate any such statement as part of a plan or scheme with the intent not to sell such personal property

or services, professional or otherwise, so advertised at the price stated therein, or as so advertised. Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding Two Thousand Five Hundred Dollars ($2,500), or by both."

Business and Professions Code Section 17502:

"This article does not apply to any visual or sound radio broadcasting station or to any publisher of a newspaper, magazine, or other publication, who broadcasts or publishes an advertisement in good faith, without knowledge of its false, deceptive, or misleading character."

Additionally, Section 17536 of the California Business and Professions Code provides for a maximum civil penalty of $2,500 for each violation. Suit may be brought by the California Attorney General, or any district attorney, county counsel or city attorney.

STATEMENT OF THE CASE

In July, 1974, defendant Forest E. Olson, Inc. began running a full page advertisement in several Southern California newspapers. The advertisement consisted of a list of 406 street addresses surrounding a box containing the following message:

> "SOLD IN 8 DAYS OR LESS in Orange and Riverside Counties! When you list your home with FOREST E. OLSON BE PREPARED TO MOVE FAST! Information from Forest E. Olson's Computer Center 1/1/74-3/31/75"

The same advertisement, with the same message modified to say "IN 4 DAYS OR LESS", was run on at least four occasions during 1975.

Also during 1975, Forest E. Olson aired a radio advertisement over 11 stations consisting of the following message played against a background of a male monotone voice reading a list of addresses from a computer readout so rapidly that the addresses could only be identified as property locations:

> You are listening to the computer readout of homes sold by Forest E. Olson Realtors in no more than eight days . . . . However, some people are skeptical, so realizing this, Forest E. Olson, a Coldwell Banker Company, was reluctant to release this following computer readout . . . Each of these homes was sold by Forest E. Olson Realtors in no more than four days . . . Startling Information? Yes. If you doubt the authenticity of this computer readout, consider this; if it weren't true, we couldn't say it. That's why we insist when you list your house for sale with Forest E. Olson, you'd better be prepared to move . . . fast.

Approximately 176 of the street addresses shown in the newspaper advertisements were of new tract houses, condominiums, and town houses for which Forest E. Olson, Inc. had exclusive sales contracts with builder developers. Although the sales contracts were executed long before the sales, a listing agreement bearing the date of sale was made out for each sale. The property thus appeared to have been sold on the very day it was listed. Additionally, approximately 10 of the addresses in the advertisement were outside of Orange and Riverside

Counties and 51 houses on the list were not sold within either four or eight days.

Forest E. Olson, Inc. explained that the appearance of the new tract sales in the advertisement was the result of inadvertence; that the advertising department had asked the data processing department for a list of all property sold in four days or less and had relied upon a computer readout list furnished by data processing; and that there had been no "formal vice presidential approval" or review of the advertisement by the company's legal department. In short, defendants maintained that the evidence showed at most an inadvertent oversight by different people in the organization with separate business functions and not an intentional misstatement or reckless disregard of the truth. Defendants conceded, however, in argument before the Court of Appeal, that the evidence presented a factual issue as to whether there was negligent dissemination of false or misleading advertising.

ARGUMENT

I.

THE *NEW YORK TIMES v. SULLIVAN* MALICE STANDARD DOES NOT APPLY TO FALSE ADVERTISING STATUTES.

Section 17500 of the California Business and Professions Code *et seq.* evolved from the so-called "Printers Ink Model Statutes" and was drafted in 1911 at the behest of the advertising journal of the same name.[1] The original printers ink model statute made advertisers absolutely liable for false and misleading statements made in the

[1] The "Printers Ink Model" either in its original form or as modified, has been adopted in 44 states and the District of Columbia. Note, 25 Hastings L.J. 1105, 1106 fn. 9.

advertisement.

Proof of an absence of intent to deceive by the advertiser was not a defense under the Model Statute. The California legislature, however, rejected the strict liability standard in favor of a reasonable care standard. Section 17500 continues the reasonable care standard, prohibiting false advertising "which is untrue or misleading, and which is known or by the exercise of reasonable care should be known, to be untrue and misleading."

Petitioners' advertisement was pure commercial speech; the advertisement did not communicate or editorialize on political, social, cultural or other protected subject matter. Petitioners concede in their petition that the State of California has a compelling interest in protecting the public and competitors from false and misleading advertisements.

The thrust of petitioners' attack upon California's false advertising law is concerned with the imposition of civil penalties for negligent dissemination of false and misleading advertising and its alleged chilling effect upon the free flow of commercial speech. According to petitioners, a false advertising statute which provides for exaction of a civil penalty for each violation of the law cannot pass constitutional muster unless it requires proof that the advertiser knew the information was false and misleading or acted with conscious disregard for the truth. See *New York Times v. Sullivan,* 376 U.S. 254.

Petitioner's contention assumes that since commercial speech has been given some protection by this Court that perforce it is entitled to the same protection afforded to non commercial speech.

Decisions of this Court relating to commercial speech dispel any such assumption.

The Court in a series of recent decisions has repudiated the idea expressed in *Valentine v. Christensen,* 316 U.S. 52, that commercial speech is unprotected by the First Amendment, because society and the free enterprise system has a genuine interest in the free flow of commercial information. (*Bates v. State Bar of Arizona,* 433 U.S. 350; *Linmark Associates, Inc., v. Willingboro,* 431 U.S. 85; *Virginia Pharmacy Bd. v. Virginia,* 421 U.S. 809). This Court has held that advertising which does "no more than propose a commercial transaction" is deemed an exercise of a First Amendment right (*Virginia Pharmacy Bd. v. Virginia Consumer Council, supra,* 425 U.S. 748, 771, fn. 24, quoting *Pittsburgh Press Co. v. Human Relations Comm'n.,* 413 U.S. 376, 385).

In *Virginia Pharmacy Bd. v. Virginia Consumer Council, supra,* this Court clearly stated that commercial speech is subject to reasonable state regulations, however, and that among those regulations which "are surely permissible" are restraints on false, deceptive or misleading advertising.

This Court has consistently indicated that while commercial speech is accorded some constitutional protection, it has not elevated commercial speech to the same level of protection, on the scale of First Amendment values it has accorded to other types of speech. In *Ohralik v. Ohio State Bar Assn.,* 436 U.S. 447, at 455-456 this Court declared:

> In rejecting the notion that such speech "is wholly outside the protection of the First Amendment", *Virginia Pharmacy, supra,* at 761, we were careful not to hold 'that it is wholly undifferentiable from other forms' of speech. 425 U.S. at 771 n. 24. We have not discarded the 'commonsense' distinction between speech

> proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. *Ibid.* . . . [W]e instead have afforded commercial speech a limited measure of protection, *commensurate* with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression . . . .
>
> [T]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity. Neither *Virginia Pharmacy* nor *Bates* purported to cast doubt on the permissibility of those kinds of commercial regulation.

Petitioners seek in effect to have this Court treat the purely commercial speech herein the same as speech containing bona fide of political and social comment, by asking the court to apply the *New York Times v. Sullivan* malice standard. See *New York Times v. Sullivan,* 376 U.S. 254.

In New York Times v. Sullivan, supra, a city official instituted a civil libel action against four clergymen and the New York Times. The suit was based on an advertisement carried in a newspaper criticizing police action against members of the civil rights movement and soliciting funds for the movement. The advertisement contained factually erroneous defamatory material. This Court held that the plaintiff must show actual malice: knowledge that the material was false, or in the alternative that the information was placed in the advertisement with reckless disregard for the truth. This Court did so because the communication involved important political comment

regarding a public official. The Court characterized the advertising (at 266) stating the Times advertisement communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.

The protection accorded in *New York Times v. Sullivan, supra,* to persons criticizing public officials was found by the United States Supreme Court to be equally applicable to public figures. *Curtis Publishing Co. v. Butts,* 388 U.S. 130, and not applicable to private individuals defamed in connection with public events. (See *Gertz v. Welch,* 418 U.S. 323.)

One of the analytical problems with analogizing between defamation cases and false advertising cases stems from the fact that in the former situation a real person's reputation is damaged by false statements, but in the latter case it is the buying public itself which is harmed.

Respondent contends that for the following common sense reasons, the rationale for requiring the proof of malice set forth in *New York Times v. Sullivan* does not apply to false advertising statutes.

1) Unlike in a false advertising situation *New York Times v. Sullivan* dealt with the non-malicious use of false statements in the expression of beliefs and ideas concerning public officials. *New York Times* clearly indicated that "neither the intentional lie nor the careless error materially advances societies' interest in uninhibited, robust and wide-open debate on public issues." *New York Times v. Sullivan,* 376 U.S. 254, 270. This Court required the malice standard in New York Times because it was obvious that in public debate errors would occur, and that fact alone might inhibit freedom of expression. Unlike

public debate on public issues, an advertiser has the time to calculate his speech and insure its accuracy.

In Justice Stewart's concurring opinion in *Virginia Pharmacy Bd., supra,* he emphasized the fact that the "advertiser's access to the truth about his product and its price substantially eliminates any danger that governmental regulation of false or misleading price product advertising will chill accurate and nondeceptive commercial expression" and that therefore there is "little need to sanction 'some falsehood in order to protect speech that matters.' " (*Id.* conc. opn. Stewart, J., pp. 777-778.)

2) *New York Times v. Sullivan, supra,* and *Curtis Publishing Co. v. Butts, supra,* are primarily concerned with criticism of public officials and public figures who have thrust themselves into the public limelight and presumably have access to the media which will enable them to deny the false statements made about them and thus defend themselves. In false advertising cases, the public may never even know if an advertisement is indeed false and is certainly not in a position to "defend itself" in the very media which receives a fee from the advertiser to publish the advertisement.

3) Unlike the person who criticizes a public official and who might do so in error, an advertiser presumably knows his own product or service and is in a superior position to have all the facts concerning it at his disposal. See *Bates v. State Bar of Arizona,* 433 U.S. 350, 383.

4) Unlike persons who may have defamed and wish to sue for damages as a result of defamatory statements, the public at large who reads and relies on advertisements in the media may, in fact, never know they are victims of false, deceptive or misleading advertisements. Even if members of the public became aware of the false nature of the advertisement, it is unlikely they would sue for damages.

5) The High Court in *New York Times v. Sullivan, supra,* was primarily concerned with the protection of the right of newspapers and other media to print false information about public officials.

The California false advertising statute exempts newspapers and other media from suit unless they know the information is false. California's false advertising statute seeks to control false advertising by exaction of a civil penalty against the advertiser alone, who presumably is in a superior position to advertise the truth about his product.

6) The injury to consumers victimized by false or deceptive advertising is no less when it results from negligence than when knowingly or recklessly made.

Even if it could be argued that *New York Times v. Sullivan* and its progeny apply to the analysis of the constitutionality of California's false advertising statute, the recent case of *Gertz v. Welch,* 418 U.S. 323, clearly indicates that the states have the power to regulate negligent speech.

In *Gertz v. Welch, Inc.,* this Court refused to extend the requirement that a plaintiff in a defamation suit must show "New York Times malice" in situations where the plaintiff is not a public official or public figure even though the plaintiff is defamed in an article about matters of public importance.

In that case, this Court balanced the legitimate state interest underlying the law of libel against the interest of preserving the First Amendment guarantee of freedom of expression and found that as long as states do not impose liability without fault, the state may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehoods injurious to private individuals.

In limiting the kinds and amounts of damages that could be recovered by a private plaintiff in a defamation action, the Supreme Court in *Gertz v. Welch, supra,* stated that remedies for defamatory falsehood reach no further than is necessary to protect the legitimate interest involved. The court refused to allow recovery of punitive and presumed damages, because in defamation of a private person where no malice is shown, the state's only legitimate interest is the compensation of the injured victim. The Court viewed the awarded punitive damages as a windfall for the private plaintiff.

It is important to note that this Court in *Gertz* upheld reasonable regulation of negligent speech even though the subject matter of the speech was of public concern. It is apparent that reasonable regulation of negligent advertising should also be upheld since advertising is accorded less protection under the Constitution.

II.

THE STATE OF CALIFORNIA HAS A LEGITIMATE INTEREST IN IMPOSING CIVIL PENALTIES FOR FALSE AND MISLEADING ADVERTISING.

As, the California Supreme Court recognized in *People v. Superior Court (Jayhill),* 9 Cal. 3d 283, both criminal prosecution of persons and corporations for false advertising violations, or granting of civil injunctive relief are normally inadequate remedies to deter or redress false advertising violations. The court found that the legislative intent in enacting Business and Professions Code Section 17536, which imposes a civil penalty up to $2,500 per violation, was to strengthen the hand of the Attorney General in seeking redress for violations of Business and Professions Code Section 17536. The court declared in footnote 3 at 289:

> The purpose of section 17536 has been described as follows: "The new civil remedy was added because the injunction and misdemeanor provisions of the old law were not adequate to stop false advertising rackets. The injunction is little more than a cease and desist order. The guilty party keeps his gains and is merely ordered not to defraud people in the same way again. Criminal prosecutions are seldom undertaken because juries tend to be reluctant to apply criminal sanctions to white-collar crimes and because it is difficult for outsiders to fix responsibility in the modern corporate structure. (Review of Selected 1965 Code Legislation (Cont. Ed. Bar 1965) p. 21.)

Herein the trial court, at the conclusion of a trial, has the discretion to award a civil penalty which cannot exceed $2,500 per violation. The imposition of this discretionary penalty is not without limitations however. The penalty must not be so oppressive or unreasonable as to be violative of due process of law. (*Hale v. Morgan,* 22 Cal. 3d 388; *People v. Western Airlines,* 42 Cal. 2d 621, *Ex Parte Young,* 209 U.S. 123.) Recognizing the Fifth Amendment Due Process of Law limitation upon the imposition of oppressive and excessive fines, the California Fourth District Court of Appeals, in its decision herein, *People v. Superior Court (Forest E. Olson),* 96 Cal. App.3d 181, 198 set forth the factors to be considered by the trial court in determining the amount of civil penalties to be awarded for each violation of law:

> Even under our interpretation of the statute, the trial court must manifestly act reasonably in light of all pertinent factors including the kind of misrepresentations or deceptions, whether they were intentionally made or the result of negligence, the circulation of the newspaper, the nature and extent of the public injury, and the size and wealth of the advertising enterprise.

The California Fourth District Court of Appeals, by enunciating the factors which trial courts should consider in determining what a fair civil penalty is, established a flexible and reasonable approach to the redress of false advertising violations. When Section 17500 of the Business and Professions Code is examined in the light of its history, it is clear that such consumer protection laws prohibiting false advertising sprang forth from the abuses of mighty corporations and not from mere inadvertent transgressions of small businessmen. The rationale of Section 17500 and Section 17536 of the Business and Professions Code, as interpreted by *People v. Superior Court (Jayhill), supra, Hale v. Morgan, supra,* and the court below, lies in the law's ability to address violations by both large and small advertisers. The potential award of civil penalties is thus not arbitrary, capricious and oppressive.

CONCLUSION

The California Legislature, in enacting California's false advertising law, properly struck a balance between the public's right to disseminate such information, and the state's interest that the advertising be truthful and accurate. The Legislature properly placed the burden on the advertiser, who knows his product and service, to be reasonably accurate in all advertising. History, as well as logic and human nature, show clearly that the award of a fair, reasonable and discretionary civil penalty is the only meaningful way to enforce truthful advertising laws. The California false advertising laws are thus constitutional, and do not create an unwarranted chilling effect on

commercial communication. Thus the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 3340 Ocean Park Boulevard, Suite 3005, Santa Monica, California 90405: that on April 15, 1980, I served the within *Opposition to Petition for a Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Monica, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on April 15, 1980 at Santa Monica, California.

Suzanne Newman
(Original signed)